

March 27, 2014

Christine Davi, City Attorney
City of Monterey
512 Pierce Street
Monterey, CA 93940-2621

Re: Your Request for Advice
Our File No. A-14-040

Dear Ms. Davi:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note that all advice is based only on the provisions of the Act. We offer no opinion on the application of other laws that may apply, such as common law conflict-of-interest rules.

QUESTION

Do the Act’s conflict-of-interest provisions prohibit Monterey Mayor Chuck Della Sala from making, participating in making, or influencing a governmental decision concerning the North Fremont Specific Plan (“NFSP”)?

CONCLUSION

No. Mayor Della Sala may make, participate in making, or influence any decisions concerning the NFSP if he determines that there are no facts that establish a reasonably foreseeable material financial effect on his interests.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You are the City Attorney for the City of Monterey and seek advice on behalf of Mayor Della Sala as to whether he has a disqualifying conflict of interest in an upcoming governmental decision.

Specifically, the Monterey City Council will consider and vote on the NFSP on April 1, 2014. Under the NFSP, the Planning Commission recommends that the City Council should: 1) adopt a Mitigated Negative Declaration; 2) adopt an ordinance rezoning portions of the North Fremont Specific Plan Planning Area from Community Commercial to Planned Community - North Fremont; and 3) adopt a resolution repealing the North Fremont Area Plan and adopting the NFSP.

The NFSP area is 47.7 acres, covering less than 1% of the City's total acreage. The NFSP is a long-range planning document which, according to City staff, proposes to "create a livable community and a revitalized destination point on North Fremont Street for residents and visitors. It will provide guidance for the development of transit-oriented, mixed-use development along the North Fremont Street corridor, as directed by the City of Monterey General Plan goals and policies."

The proposed NFSP does not increase the quantity of development currently allowed by the zoning ordinance or the General Plan. Under current zoning regulations, over 1.147 million square feet of new construction is permissible. The proposed NFSP allows only the quantity of growth that can be accommodated using existing water within the planning area. Staff took a "water constrained" approach to make assumptions regarding the NFSP build-out quantities, and the NFSP anticipates less development than is otherwise currently permitted by the zoning ordinance or General Plan.

A "water constrained" approach is utilized because the State Water Resources Control Board ("SWRCB") determined that CalAm, the regional water provider, does not have valid permits for nearly 70% of the water it supplied to Monterey Peninsula cities from the Carmel River. Delay and impediments to the development of alternative water supplies caused the SWRCB to issue a cease and desist order in 2009, which ordered CalAm to cease all unauthorized diversions of water from the Carmel River no later than December 31, 2016. According to expert economic testimony credited by the California Public Utilities Commission, the failure to have an operational solution in place by December 31, 2016, will result in adverse economic impacts to the Monterey Peninsula of more than \$1 billion per year and the loss of some 6,000 jobs.

The aforementioned cease and desist order also requires CalAm to impose a moratorium that would prohibit new service connections or any increased use of water at existing service addresses resulting from a change in zoning or use. Consequently, the "water constrained" approach taken by the proposed NFSP permits 50,000 square feet of commercial and 130 dwelling units (97,500 square feet), totaling 147,500 square feet of potential new construction.

This figure is well below the 1.147 million square feet permissible under current regulations. No new residential units have been constructed in the NFSP area since the City adopted its General Plan in 2005. When a new water source for the Monterey Peninsula is developed and available, the NFSP will be updated.

The proposed NFSP would replace the existing area plan with a more comprehensive strategy for the enhancement of this commercial corridor as a mixed use neighborhood. The proposed NFSP provides specific development standards and design guidelines, an inventory of existing and proposed improvements to the neighborhood's infrastructure, and an implementation strategy that addresses possible financing mechanisms.

The proposed NFSP distinguishes three character areas by design and function: 1) a visitor serving area; 2) a village center; and 3) a neighborhood serving area. These proposed character areas will evolve to achieve their design and function objectives as new development is proposed, subject to specific design criteria. The proposed NFSP is expected to result in economic progress and prosperity for the community because residents and visitors will have a revitalized North Fremont area to explore and experience. Property values are expected to increase and commerce is expected to improve within the NFSP area.

Mayor Della Sala does not own property either within the NFSP or within 500 feet of the boundaries of the NFSP. He is an employee/owner of Pacific Real Estate, Inc., where he is a realtor/broker. Neither Mayor Della Sala nor Pacific Real Estate has listed, bought, sold or managed property within the NFSP in the last 12 months. He does, however, have clients who pay him fees to manage their property, and four of the properties he manages are located within 500 feet of the NFSP.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in any given governmental decision.

As the Mayor for the City of Monterey who intends to vote on the proposed NFSP, Mayor Della Sala is a public official who will be making a governmental decision. He therefore meets steps one and two.

Step Three: What are Mayor Della Sala's interests?

Under Section 87103 and Regulations 18703 - 18703.5, inclusive, a public official has an interest in:

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- Any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- Any source of gifts to him or her if the gifts total \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- His or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

Real property

Assuming Mayor Della Sala has an interest in real property of \$2,000 or more, he has an interest in that real property for purposes of this conflict-of-interest analysis.

Business Entity

Mayor Della Sala has an interest in his business, Pacific Real Estate, Inc., as an owner/employee and as an investment assuming the value of his investment is at least \$2,000.

Source of Income

Assuming Mayor Della Sala has received income of \$500 or more in the last 12 months from Pacific Real Estate, he has an interest in that business as a source of income. Moreover, he has an interest in clients who have paid him \$500 or more in the last 12 months to manage their property.

Personal Finances

A public official is considered to always have an interest in his or her personal finances. However, a financial effect on the value of real property owned directly or indirectly by a public

official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official's personal finances and would not be analyzed separately under the "personal financial effects" rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to Mayor Della Sala's circumstances and we will not discuss it further.

Step Four: Will Mayor Della Sala's interests be directly or indirectly involved in the upcoming governmental decision?

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given interest is material, we must first determine if his interest is directly involved or indirectly involved in the governmental decision. (Regulation 18704(a).)

Real Property

Real property in which a public official has an interest is considered directly involved if the property is located within 500 feet of the boundaries of the property that is the subject of the governmental decision or impacted as set forth in Regulation 18704.2(a)(2) - (6). (Regulation 18704.2(a)(1).) Real property that is not directly involved in a governmental decision is considered indirectly involved.

Your letter states that Mayor Della Sala does not own real property located within (or within 500 feet of) the proposed NFSP and that Regulation 18704.2(a)(2) - (6) do not apply. Therefore, any real property owned by Mayor Della Sala would be indirectly involved in the decision.

Business Interests and Sources of Income

Regulation 18704.1(a) states that a person, including business entities and sources of income, is directly involved in a decision before the official's agency when that business entity or source of income, either directly or by an agent:

- (1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

Such interests that are not directly involved in governmental decisions under the rules quoted above are regarded as indirectly involved. (Regulations 18704(a) and 18704.1(b).)

According to your letter, which includes the Council Agenda Report, the Planning Commission is recommending that the City Council adopt the NFSP, which has essentially grown out of the City's General Plan. In other words, the decision regarding the NFSP was not initiated by Mayor Della Sala's business or sources of income; nor are his interests named parties in, or the subject of, the proceeding within the meaning of Regulation 18704.1. Therefore, barring additional facts, Mayor De Sala's business and his sources of income are indirectly involved in the decision concerning the NFSP.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on Mayor Della Sala's interests?

Having identified the interests involved, and determined whether each interest is directly or indirectly involved in the decision at issue, it is necessary to identify the materiality standard applicable to each interest and whether it is reasonably foreseeable that the decision's financial effect will meet the applicable standard of materiality. For a material financial effect to be foreseeable on an official's interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Indirectly involved real property: The financial effect of a governmental decision on indirectly involved real property is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an interest that make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. (Regulation 18705.2(b)(1).)

Examples of these specific circumstances include, among other factors, development potential or use of the official's real property or the character of the neighborhood, including effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. (Regulation 18705.2(b)(1)(A-C).) This provision recognizes that depending on the scope of the project, under certain circumstances, a material financial effect can occur beyond the 500-foot rule.

You have provided no facts to suggest the decision concerning the NFSP would have an indirect material financial effect on any real property owned by Mayor Della Sala; therefore, we do not further analyze the potential indirect effects on his real property.

Indirectly Involved Business Interests: Your letter states that Mayor Della Sala's business does not fall under Regulation 18705.1(a)-(c). Therefore, his business would come within Regulation 18705.1(c)(4), which provides that the financial effect of a governmental decision on a small business entity is considered material if it is reasonably foreseeable that:

(A) The governmental decision will result in an increase or decrease in the value of the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.

According to your letter, Mayor Della Sala stated that none of the three financial effects just listed would result from the governmental decision at issue. Therefore, based on his statement,² we conclude that it is not reasonably foreseeable that the decision concerning the NFSP will result in a material financial effect on Mayor Della Sala's business.

Indirectly Involved Sources of Income: Regulation 18705.3(b)(3) provides the materiality standards for interests in persons, other than business entities,³ who are sources of income to the public official and are indirectly involved in a governmental decision. For an indirectly involved source of income, who is an individual, the effect of a decision is material if any of the following apply:

(A) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

(B) The decision will affect the individual's real property interest in a manner that is considered material under [Regulation] 18705.2(b).⁴

According to your facts, four of the properties that Mayor Della Sala manages for clients are located within 500 feet of the proposed NFSP. Your facts also state that the proposed NFSP is expected to result in economic progress and prosperity for the community, and that property values are expected to increase and commerce is expected to improve within the NFSP area.

² Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra.*) Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra.*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

³ The materiality standard for Mayor Della Sala's interest in his business as a source of income is identical to the materiality standard used for his interest in the business as a business entity. (See Regulation 18705.3(b)(1).)

⁴ See the discussion involving Regulation 18705.2(b) under "Indirectly Involved Real Property" above.

However, according to your letter, Mayor Della Sala stated that he “does not believe that the rent or income producing potential for any of his clients’ properties will change as a consequence of decision on the NFSP.” Accordingly, based on his statement, we conclude that it is not reasonably foreseeable that the decision concerning the NFSP will result in a material financial effect on Mayor Della Sala’s property management clients.

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

You have not provided any facts suggesting either the “public generally” or the “legally required participation” exceptions would apply to your circumstances, so we will not address them further.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl